IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO. 517 OF 1999

Asfaque Mehtab Mirza @ Munna Khan @ Raju
@ Rajkumar Ramakant Yadav ....Appellant.
(Orig.Accd.)

Versus

The State of Maharashtra ....Respondent.

Mr.Amin Solkar, Adv. for the appellant.

Mrs.U.V.Kejriwal, APP for the State.

CORAM: V.G. PALSHIKAR
AND
ANOOP V. MOHTA, JJ.

21.9.2004.

ORAL JUDGMENT: (Per Palshikar, J.)

Being aggrieved by the judgment and order of conviction and sentence passed by the Additional Sessions Judge, Greater Mumbai, on 17.7.1997 in Sessions Case Nos.279/93 and 824/1994 against the present appellant-original.accused No.2, the appellant has preferred this appeal.

2. This case was launched by the prosecution against three persons. Accused No.1 was Chandrabahadur Kisanbahadur Gurung, accused No.2 was Asfaque Mehtab Mirza @ Munna Khan @ Raju @ Rajkumar Ramakant Yadav and accused No.3 was

Mokim Khan Abdul Bazhir Khan. They were charged with several sections including 302 for causing homicidal death of Smt.Kamladevi Omprakash Chopda. However during the trial accused Mokim Khan was absconding and therefore his case was separated and accused Nos.1 and 2 were prosecuted. The prosecution examined 17 witnesses to prove its case and on appreciation of the evidence the learned Additional Sessions Judge came to the conclusion that the prosecution has failed to prove any offence accused No.1-Chandrabahadur and proceeded to convict accused No.2-Asfaque, the present appellant under various sections as mentioned above. It is this appeal by the accused No.2 which are have now to decide.

3. With the assistance of the learned counsel for the accused and the learned public prosecutor we have scrutinized the record and reappreciated the evidence on record. The prosecution story as emerges from our reappreciation stated briefly is that on 23.12.1992 around 11.00 p.m. The husband Omprakash-P.W.1 and the wife Kamladevi now deceased closed all the doors from inside the house and went to sleep. At about 3.30 in the morning of 24.12.1992 there was sound of bell and the wife Kamladevi went to answer the call. The husband waited for the wife to return and having found that she has not so returned for more than five minutes went to drawing room to notice that the wife was lying on the ground and accused No.2 was gaging her throat by his hand and the wife was struggling. The husband also noticed pool of blood around the body. At the same time the husband was noticed by accused No.2 Mokim who rushed to the husband and injured him severely and thereafter ran away. Police were then called, FIR recorded as the accused persons were duly identified and named. Investigation started. Accused

Nos. 1 and 2 were arrested and inspite of efforts Mokim could not be arrested and therefore his case was separated as mentioned above and the other accused were tried after investigation. The prosecution examined 17 witnesses to prove its case. We will consider in detail our reappreciation of this evidence which found favour with the learned trial Judge in granting conviction to accused No.2.

4. P.W.1-Omprakash Chopda is the complainant and husband of the deceased Kamladevi. He has extensively deposed in the Court about the whole incident. He states that around 11.00 in the night they i.e. Witness and the wife closed all the doors from inside and went to sleep. He then states that around 3.30 a.m. on the following day door bell was heard by both man and the wife and the wife got up and went to answer the call. The witness waited for her to return but having found that she has not returned for five minutes or more went to the drawing room where he saw accused No.2 gagging the throat of Kamladevi with his hands and Kamladevi was struggling. (This necessarily means that at hat time Kamladevi was alive.) He then noticed pool of blood around body of Kamladevi at the same time accused Raju and Mokim saw him and rushed to him. They assaulted him. He tried to ward off the injuries but did sustain few bleeding injuries. Describing this assault on the witness, witness says “accused No.2 and Mokim saw me and Mokim rushed upon me to assault by chopper and I tried to ward off the said blow.” He then states that he caught hold of Mokim by his left hand and Mokim tried to separate himself from the grasp of the witness the therefore the witness hit finger of the accused Mokim. In relation to accused No.2 he has to say only this “accused No.2 also rushed upon me I also sustained injuries on my left cheek and left side head. I do not know as to

who assaulted me on my cheek and left side head." Then the witness speaks of these persons running away. He saw Mokim running away with chopper. The witness then further narrates in detail how he called his daughters, how he was treated by the doctor at home and then in Hinduja hospital. Witness thereafter is subjected to a detailed cross examination. In the cross examination the witness has categorically stated that all the doors of his flat were closed from inside. He then denies the suggestion that the wife went to open the door of flat to answer to the bell which rang. He then asserts that the main door was opened after arrival of his son-in-law. He thus asserts his earlier statement in the examination in chief that all the doors of house were closed from inside and main door was opened for the first time after arrival of his son-in-law.

5. P.W.2 is Dr.Rajendra Mehra son-in-law of P.W.1. He gives a corroborative statement with P.W.1 on all material points. He has deposed that around 3.45 a.m. On 24.12.1992 he received phone call from P.W.1 who told him on phone that Raju has committed murder please come soon. When he entered the flat he saw P.W.1 injured and deceased lying in a pool of blood. He therefore attended to P.W.1 call for further medical assistance admitted the witness P.W.1 to Hinduja hospital. He then tells as to how the police came and how the investigation started. This witness also is cross examined. P.W.3 Satlug Dheer is the second son-in-law of the couple. He received phone call around same time as P.W.2 but the call was from his sister-in-law Rita who is daughter of P.W.1. He was told on phone by Rita that Raju stabbed his mother-in-law and father-in-law. He then proceeds to narrate how the father-in-law was treated and how the police started their investigation.

6. P.W.4 Khemanand Sharma is a domestic servant in the house of P.W.1. He has deposed that he is domestic servant in the house of Omprakash the complainant. He speaks of his acquaintance with Mokim, Raju and Bahadur. He then deposes that on the date of incident he was sleeping on the terrace, accused No.1 was sleeping on the terrace and accused Mokim was also sleeping by side of this witness P.W.4. He deposes that Mokim after having his meals slept by side of the witness. Then as eye witness of the assault he has to say the following:

> "We slept at about 10.30 p.m. At about 3 or 4.00 a.m. On 24.12.92 I heard the shouts of P.W.1 when I got up I did not see Mokim on his place. I saw from the door of the terrace that Mokim was assaulting P.W.1 with the chopper. Accused No.1 was also standing behind me on the terrace. Accused No.1 ran towards another terrace and Mokim also followed him. Mokim was having a chopper in his hand stained with blood. Accused No.2 came from the passage of drawing room and ran towards the terrace where accused No.1 and Mokim had gone. After couple of minutes I went on the terrace and I saw that Mokim Bahadur and Raju climbed down the pipe line. When I came back I saw that P.W. 1 had received injuries to his right hand and other part of the body, I saw Smt.Kamladevi in a drawing room lying dead. P.W. 1 told me that Raju and Mokim killed Smt.Kamladevi."

From the above quotation it will be seen that this witness gives clean chit to accused No.1

when he says that at the time when Mokim was assaulting P.W.1 accused No.1 was standing behind him. He speaks of Mokim running away with chopper in his hand. He saw accused No.2 coming from passage and running towards terrace where accused No.1 and Mokim had gone. He has also seen all the accused running away after climbing down pipeline. When he came back he was told by P.W. 1 that Raju and Mokim killed Kamladevi. The witness therefore is not eye witness to assault of Kamladevi. He has very clearly deposed that he saw Mokim was assaulting P.W.1 with the chopper. Speak anything about accused No.2 assaulting anybody. He only speaks of noticing him and his running away with all the accused persons. This witness goes to admit in cross examination that Bahadur has not done anything apart from running away. He further states in cross examination that it was he who opened the main door. It will thus be seen that this witness is only an eye witness to assault by Mokim to P.W.1 and he does not in any manner involve accused No.2. P.W. 5 – Sadashiv Sathe is the doctor who treated the witness P.W.1 in Hinduja hospital. He proves injuries caused to the witness and states that the injuries were serious. However his evidence otherwise is inconsequential. P.W. 6 – Rajaram Marathe is also a doctor who conducted post mortem and proved that Kamladevi met homicidal death. This witness has deposed to the injuries caused to the victim and has stated that the death was unnatural and due to cumulative effect of injuries described by him. He has nowhere stated any abrasion or bruises on the neck of the victim which must occur if a person is seriously gagged by pressing throat. It is pertinent to note here that what has been deposed to by P.W. 1 is that he saw accused No.2 Raju gagging throat of Kamladevi. The post mortem report does not reveal any such indication of gagging. P.W. 7 is Omprakash Monga. He was present when the

investigation was going on around the flat and has deposed to it at length. His evidence is however wholly inconsequential.

7. P.W. 8 is Reeta Mehra daughter of P.W.1 and victim Kamladevi. She narrates what she saw after he arrival at the flat of her father. She accepts the fact that she knew the accused Raju and has identified him in the Court along with accused No.1. She then states that phone call was received by her husband from her father complaining of assault by Raju on her mother. She then called for doctor to attend her father. She also noticed the dead body on her mother. In cross examination she says that it was her husband who told her that Raju has dome something bad. She states that when she visited the house of her parents the door was closed. It is this door which is opened on her arrival by P.W. 4.

8. P.W. 9 Shivkumar is the witness who collected clothes of the victim P.W. 1 P.W 10 – Devkumar is the doctor who treated P.W.1 being their family doctor since 1976. He tells us how P.W 8 Reeta went to him and informed him about the assault. According to this witness Reeta was able to say only “mummy daddy, blood blood”. He therefore accompanied her to the house of P.W. 1 and noticed Kamladevi lying in a pool of blood. On examination declared her dead. Then he speaks of treatment given to P.W. 1 at Hinduja hospital. It should be noted therefore from the evidence of this witness that when he was called by P.W. 8 she was incoherent and she did not tell him that who is the assailant. P.W. 11 Satish Bhatia is the doctor who was skin specialist attached to J.J. Hospital. This witness speaks of treatment given to P.W. 1. The evidence of these three

doctors who treated P.W. 1 prove beyond doubt that P.W. 1 sustained serious injuries but at whose hand is the question. P.W. 12 Vinay Kothari is the doctor who first examined Omprakash P.W. 1 on admission in the Casualty department of Hinduja hospital. P.W. 13 Sudhirbhai Shah is photographer. He deposes to have taken 23 photographs of the spot where the assault occurred and he has proved them. P.W. 14 Uttam Navghare is the police inspector who arrested the accused No.2. He proves arrest panchnama.

9. P.W. 15 Shankar Puri is senior Police Inspector attached to Colaba police station. At the relevant time he was attached to Khar police station.

10. P.W. 16 Sudhir Beoknalkar is Police Sub Inspector who was attached to Khar police station at the relevant time and was the first man to reach the spot. He narrates as to how he took the injured to the hospital and the deceased to the morgue.

11. P.W. 17 Madhukar Choudhary is Assistant Police Inspector who was at the relevant time attached to Khar police station. He deposes to the arrest of this accused No.2 and the identification parade held thereafter. This is the total evidence as discussed above led by the prosecution on the basis of which the learned trial Judge acquitted accused No.1, convicted accused No.2 and accused No.3 is absconding. We have to consider in the light of the aforesaid analysis of evidence on reappreciation by us whether the charge as found proved by the trial Judge is factually proved requiring conviction of accused under section 302. It has to be seen that though there are persons examined as eye witnesses nobody has seen the actual assault by chopper on Kamladevi. All that

P.W. 1 saw was accused No.2 gagging Kamladevi. This aspect of his deposition is not corroborated by medical evidence as the doctor who conducted post mortem does not speak of any ligature marks on the neck of the victim. P.W. 4 who saw the assault on P.W. 1 by Mokim does not speak anything about any assault on Kamladevi by any of the accused. As already stated he totally absolves accused No.1 and speaks of accused No.2 running away with other accused. He also does not attribute any over tact to accused No.2. All other witnesses speak of accused No.2 killing the victim only on the basis of statement made by P.W. 1 Omprakash who told everybody who cam on the scene of offence thereafter that accused No.2 assaulted the victim. Even if this statement of the witness is accepted as truth what he saw was accused No.2 gagging throat of Kamladevi and at that time Kamladevi was kicking and was alive trying to save herself. The death obviously is caused by assault by chopper. There is no evidence of gagging at the same time there is no escape from finding that accused No.2 was involved in the entire operation. What was his role is not spelt out by the prosecution. Nobody attributes to him any assault on P.W. 1 Omprakash. That is attributed both by P.W. 1 Omprakash and P.W. 4 to Mokim who is absconding. None of the witnesses therefore directly implicate the accused in assault on Kamladevi. P.W. 1 does not accuse accused No.2 of assaulting him. There is thus no evidence on record to connect accused No.2 to death of Kamladevi.

12. The learned trial Judge has missed certain vital circumstances while convicting accused No.2 under section 302 and other sections. He has not found out and we must say that the prosecution has failed to prove as to how the accused persons

whether accused 1 or 3 entered the house when P.W. 1 in all solemnity insists that the doors were closed by him from inside. The initial entry of the assailants therefore is unexplained. The witnesses specifically absolves accused No.1. Even P.W. 1 does not attribute any motive to accused No.1 and expresses surprise at his running away. The chopper which was found lying on the site is not duly connected to accused No.2. Admittedly accused No.3 ran away with his own chopper. There has to be therefore direct connection in the chopper found on the spot and accused No.2 before he is found guilty of murdering Kamladevi with that chopper. Apart from that there is no apparent motive for accused No.2 to do such a grievous act. Though accused No.1 has stated that he was angry over his termination he continued to visit and was on cordial enough terms to sleep there at night along with other accused persons. There is therefore no previous enmity which can be cause of this assault. Following things are therefore missing:

i) proof regarding initial entry of the accused persons in the flat;

ii) motive for accused No.2 to do anything of the kind alleged;

iii) absence of ligature marks on the neck of victim;

iv) only allegation against accused No.2 by P.W. 1 is of gagging the victim and which allegation proved that at the time when gagging was going the victim was alive.

These aspects, in our opinion, are vital enough and therefore cannot be ignored. If the entire evidence if so appreciated it is clear that though the presence of accused No.2 at the scene of offence is proved benefit of doubt will have to be given to him for lack of

any other cogent connecting evidence. In the result, therefore, appeal succeeds and is allowed. Accused if not otherwise required be set at liberty forthwith.